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No. 81-153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THE DOW CHEMICAL COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1. The submissions of the Company and of the Board suggest that the first issue presented in the petition—the *Mastro Plastics v. Labor Board*, 350 U.S. 270, issue—is one of fact as to which there is no conflict in the circuits. But the issue is one of law on which two circuits are in direct conflict.[1]

[1] The facts that frame the issue are undisputed and far from unique. In mid-term of a collective agreement, the Company unilaterally determined to take an action that would have significantly affected the wages and working conditions, including a substantial loss in earnings, of 16 employees. The Union insisted that the Company had a *statutory* duty to bargain with the Union over whether that change should be made. The Company claimed that it had a *contractual* right to make such a change without bar-

This Court in *Mastro Plastics* ruled that a no-strike clause virtually identical to that here did not "waive the employees' right to strike against the unfair labor practices committed by their employers." 350 U.S. at 279. The court below, without purporting to overturn the Board's finding that the Company had committed a "serious" unfair labor practice, ruled that the doctrine of *Mastro Plastics* "does not apply" where "the very existence of [the unfair labor practice] depends upon competing interpretations of a contract, either one of which would be valid." Pet. App. 16a, 19a. Under that approach, no matter whether the Company's unfair labor practice was "serious" or "non-serious", the Company's bare assertion of a contractual defense to the claim that it violated its statutory duty—a defense which the Board, affirmed by the court below, found to be without merit—was sufficient to place a strike in response to that unfair labor practice within the ambit of the Union's no-strike commitment.

The issue, then, is simply whether the legal standard announced by the court below—the exception that court created to this Court's *Mastro Plastics* doctrine—is valid. That is not as the Company would have it "a narrow factual question." Dow Br. at 8. And the question presented is not, as the Board would have it, either (1) a challenge to the Board's rule in *Arlan's Department Stores of Michigan, Inc.*, 133 NLRB 802 (1961)—that a no-strike clause of the type here waives the statutory right of employees to strike against "non-serious" un-

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gaining with the Union. The contract contained a grievance-arbitration procedure through which the validity of the Company's alleged contractual right—its defense to the Union's claim that it had a statutory duty to bargain—could have been determined, but the Company insisted on implementing the change prior to the completion of that procedure, and the Union thereupon struck to protest the Company's *statutory* violation. The contract contained a general no-strike provision which did not expressly apply to unfair labor practice strikes.

fair labor practices but not the right to strike against "serious" ones; or (2) a difference with the court of appeals as to whether "Dow's [unfair labor practice] was sufficiently serious to justify [the] strike." Board Mem. at 6-7. As the Board recognized at an earlier point in its memorandum, "[t]he court . . . declined to pass expressly on the validity of the Board's use of 'serious' unfair labor practices as the basis for deciding whether a strike is protected activity. . . ." Board Mem. at 5. And for that very reason that court did not have any occasion to determine whether the Board was correct in finding a "serious" unfair labor practice. The court adopted a rule of law different from the rule followed by the Board, and the court's rule of law is the subject of the first question in instant petition.

Thus, on this issue the decision below is squarely in conflict with the decision of the Tenth Circuit in *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (CA 10 1980). In *Northeast Oklahoma*, as here, "the very existence of [the unfair labor practice over which the mid-contract strike occurred] depend[ed] upon competing interpretations of a contract, either one of which would be valid"—interpretations which could have been resolved through a contractual grievance-arbitration process. See 631 F.2d at 673-675. But there, unlike here, the court upheld the Board's determination that the strike was protected conduct under the doctrine of *Mastro Plastics*. Had the Tenth Circuit followed the rule of the court below it would have reached the opposite result on this issue.[2]

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[2] The Board suggests that the employer's initial unfair labor practice might have been more "serious" in *Northeast Oklahoma*, and that therefore the cases are not in "clear conflict." Board Mem. at 8, n. 6. Given, however, that the analysis of the court below does not depend on the "seriousness" of the employer's unfair labor practice, the difference offered by the Board, even were it correct, does not distinguish the cases.

2. The Board's memorandum contains two points in response to the second issue presented in the petition—whether a Union's breach of a contractual no-strike provision entitles the employer unilaterally to cancel the entire collective agreement—that can only be characterized as disengenuous.

First, the Board in its memorandum, while not disputing the inconsistency of its *Marathon Electric* rule with this Court's decisions in such cases as *Drake Bakeries Inc. v. American Bakery & Confectionary Workers*, 370 U.S. 254, and *United Paperworkers v. Needham Packing Co.*, 376 U.S. 247, does state that the decision of the court below approving that rule is not "a true conflict" with the decision of the Fifth Circuit in *NLRB v. State Electric Service, Inc.*, 477 F.2d 749 (Ca 5 1973). Board Mem. at 9, n.7. Acknowledging that the Fifth Circuit's decision "rejected the rule that a unions' breach of the no-strike clause 'automatically' justifies rescission," and that the court below "approv[ed]" the *Marathon Electric* rule (which the Board describes as "automatically giving the employer the right to terminate the contract for a strike in breach of contract", Pet. App. at 36a, n. 13), the Board rests its contention on the ground that the conflicting holding of the Fifth Circuit is "only an alternative holding." Board Mem. at 9, n.7. By that characterization, the Board apparently has reference to the fact that this holding was one of two grounds upon which the Fifth Circuit rested its decision. See Pet. at 16, n. 13. But such a holding is not a *dictum* and, like any holding, states the rule of the Circuit. Thus, on this issue the rule of the Fifth Circuit and the rule of the Third Circuit are in direct conflict.

Second, the Board's memorandum states that "if the petition for a writ of certiorari is granted, the Board will take the position that the case should be remanded to it for a determination of the continued validity of the

Marathon doctrine and its applicability to this case." Board Mem. at 9. But the course of this proceeding shows that the Board has no disposition to reconsider the validity of the *Marathon* doctrine. As the Company points out, the Board has followed that doctrine for nearly 30 years. Dow Br. at 15. The Third Circuit in its first decision in this case disapproved the Board's reliance on *Marathon* in this case, and remanded the issue with instructions that the Board reconsider its position. The Board did not respond to those instructions: "As we have found the strike here to be protected, we do not address ourselves to the *Marathon* rule at this time." Pet. App. at 36a, n.13. Now that the Third Circuit has approved the *Marathon* rule, there is nothing to suggest that the Board has any independent inclination to reconsider the rule, and there is therefore no basis for the remand that the Board states it will request.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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